Petition

81-1584

No.

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IN THE

Supreme Court of the United States

October Term, 1981

FRANGELLA MUSHROOM FARMS, INC., and
JOSEPH C. FRANGELLA,

Petitioners,

against

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED.

The questions presented are:

1. Where affidavits are conflicting on a motion for summary judgment, can the United States Court of Claims determine credibility without submitting the issues to trial?

2. Were the claimants denied a substantial right where pre-trial dispositions and discovery were not allowed prior to the decision on the motion for summary judgment?

3. Can the United States use in-house memoranda unpublished in the Federal Register to claim lack of authority in its agents?

4. Does an individual, who is a majority stockholder of a corporation, have no remedy when the United States, by its actions, breaches a corporate

contract or creates an estoppel where the individual has impoverished himself in reliance on the governmental action?

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PETITION FOR A WRIT OF CERTIORARI.

E. David Duncan, on behalf of the petitioners, Frangella Mushroom Farms, Inc. and Joseph C. Frangella, prays that a writ of certiorari issue to review the order of the United States Court of Claims entered in the case of Frangella Mushroom Farms, Inc. and Joseph C.

Frangella vs. The United States on November 10, 1981.

OPINIONS BELOW.

The opinion and order of the United States Court of Claims granted respondent's motion for summary judgment and denied petitioners' cross-motion for summary judgment by opinion dated November 10, 1981, and is annexed hereto as part of this appendix.

JURISDICTION.

The order and opinion of the United States Court of Claims was made and entered on the 10th day of November, 1981. The jurisdiction of this Court is invoked under 28 USC 1255.

STATUTE, FEDERAL RULES AND REGULATIONS INVOLVED.

Amendment V of the Constitution of the United States.

STATEMENT OF THE CASE.

This is a breach of contract case brought by the petitioners in the United States Court of Claims arising out of the petitioners' alleged contractual relationship with the United States Economic Development Administration.

The petitioner corporation raises and sells fresh mushrooms in the Town of Coeymans, County of Albany and State of New York. Upon the advice of E.D.A. administrators, the petitioner corporation prepared an application for a direct business development loan under 42 U.S.C.

§3142 (1976) in the amount of $1,500,000, later reduced to $1,000,000.

The basis for the application was that the petitioner corporation had sustained a problem of poor cash flow, owing to extensive modernization of its operating facilities. The petitioner corporation is one of the largest employers of minority workers in Albany County.

After extensive preparation of the required documents, the petitioner individual, as President of Frangella Mushroom Farms, Inc., and Arthur Place, a Certified Public Accountant, met with representatives of E.D.A. in Philadelphia, Pennsylvania, on November 15, 1979, at which time the representatives of E.D.A. announced that the direct loan was approved and "WASHINGTON" said the loan was going through.

At a meeting held at the City Hall at Albany, New York, on December 18, 1979, a representative of E.D.A. apologized for the delay of the closing and, again, assured the President of the petitioner corporation and Arthur Place, C.P.A., that the loan was going through.

Upon such assurances, the petitioner corporation expended its assets at the insistance of E.D.A. to keep its minority employees working and its working capital further deteriorated. The President, Joseph C. Frangella, depleted his own assets to keep the corporation in operation.

Continued delays brought about by E.D.A. alone delayed the final closing of the loan until April of 1989, when E.D.A. announced there were no more direct loans available, but E.D.A. would

entertain an application for a guaranteed loan. Immediately extensive work was commenced on the new application with all the resources of the corporation behind it and, at a meeting in the Department of Commerce Building, at Washington, D.C., on May 15, 1980, the representative of E.D.A. announced that the loan was approved.

In spite of said announcement, the closing of the loan was delayed as E.D.A. added new demands in the subsequent weeks. In spite of continued compliance with these demands, the closing of the guaranteed loan was continually delayed until August 1, 1980, when E.D.A. wrote the petitioner corporation that the loan would not be forthcoming.

This performance by E.D.A. financially crippled the petitioner corporation with the trust that E.D.A. would

honor its commitment, and Joseph C. Frangella rendered himself impoverished by contributing his remaining assets to the corporation.

On October 16, 1980, this action was filed by the petitioners in the United States Court of Claims. On January 30, 1981, the petitioners filed a motion for an order directing the production of certain documents, and for the deposing of the three E.D.A. representatives with whom the petitioners negotiated with.

In the meantime, the respondent brought on a motion for summary judgment and sought to stay the conducting of the depositions and the examination of documents. Judge Miller of the United States Court of Claims denied the motion of the respondent to suspend the discovery

proceedings on the grounds it would be unjust to deny discovery when the moving papers supplied by the United States in its motion for summary judgment contained factual statements and documents.

There is no question that the affidavits submitted by the United States and those in opposition submitted by the petitioners contain direct contradictions of facts as to what occurred at the various meetings. E.D.A. also in support of its motion for summary judgment set forth E.D.A. in-house directives as alleged evidence that there was not authority for their representatives to bind the government. It is agreed that these in-house memoranda never appeared in the Federal Register.

The action brought by the petitioners was founded on a breach of contract

based on, alternatively, breach of an express contract, a contract implied in fact, or estoppel.

The United States Court of Claims granted the United States's motion for summary judgment dismissing the petition and in its decision took it on itself to determine whose affidavits were the more credible. Prior to this decision, the Court of Claims reversed Judge Miller's order and suspended discovery pending the decision of the respondent's motion for summary judgment.

REASONS FOR GRANTING THE WRIT.

The decision of the United States Court of Claims in granting summary judgment to the United States where questions of fact are apparent when the conflicting affidavits are examined, establishes that the United States Court of

Claims has far departed from the accepted and usual course of judicial proceedings.

There is no question that the three affidavits submitted by the United States are affidavits of its agents who are cloaked in self-interest and who should be subject to cross-examination at a trial of the issues. The uniformity of the affidavits of the three government agents leaves nothing to the imagination as to the efficacy of them. The three representatives should be subject to cross-examination as they would in any other court. By fiat of the United States Court of Claims, the three representatives have escaped the truth-seeking, time-honored test of cross-examination not only at trial, but by virtue of the decision of the Court of Claims, they

have escaped the appropriate depositions before trial.

Furthermore, the denial of the discovery of the documents in the possession of the E.D.A. has denied the petitioners a substantial right. The crux of the petitioners' case will be found in the records of the E.D.A. where the minutes of the meetings and the allied papers that go with the minutes of the November 15, 1979 meeting and the December 18, 1979 meeting, will disclose the approval of the original contract on those dates. It is interesting to note that the minutes of these two meetings are nowhere to be found in the moving papers of the United States in its motion for summary judgment.

In regard to the second contract of a guaranteed loan, which the petitioners

contend the E.D.A. entered into, it should be noted that the same principle applies, i.e., that deposing the E.D.A. officer and the discovery of all its documents surrounding the date of May 15, 1980, will disclose that a contract was entered into, or, at worse, the conduct of the E.D.A. officials was such that an estoppel had occurred.

One of the main contentions of the United States on the motion for summary judgment was that by its in-house memoranda, the individuals involved had no authority to enter into a contract. It is admitted that such restrictions were not published in the Federal Register and the E.D.A. relies on its in-house memoranda. It is difficult to conceive that the E.D.A. could cloak its agents with apparent authority and then claim that, in spite of their eminent position

in the hierarchy, their authority was wanting, as it was not disclosed in in-house memoranda.

In regard to the individual, Joseph C. Frangella, who, in reliance on the E.D.A.'s contractual promise impoverished himself, it is extremely difficult to see, in this modern age of the right of the individual, that the E.D.A. and the United States Court of Claims can say he has no remedy when he has been betrayed by the agents of his government. Contractual liability has expanded beyond the shop-worn restrictions of blind privity and, if he is wronged, then he has a remedy against the government.

To touch again on the conflicting affidavits, examination of the affidavits submitted on behalf of the petitioners will disclose that it is sworn that

both the first and second contracts were entered into by the E.D.A. In regard to the first contract, not only did the government agents claim to have approved them, but at one meeting, the agent had further said that "Washington" had approved it. Assuming for the sake of argument, that there was no authority in the officers attending the meetings, it was demonstrated that they carried approval with them of the contract from "Washington." This is countered by a simple denial by the agents in their affidavits, but the United States Court of Claims on a motion for summary judgment decided which affidavits were credible. This is wrong.

In the case of *Proller v. Columbia Broadcasting System*, 368 U.S. 464, the majority opinion at page 473, stated:

> "It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony is appraised. Trial by affidavit is no substitute for trial by jury, it so long has been the hallmark of 'even-handed justice.'"

There is no doubt that the *Proller* case applies to trial without jury also. It should further be pointed out that, in the *Proller* case, there is a dissent by Judge Harlen, who would have granted summary judgment in that case on the grounds that all pre-trial examinations had been completed. Judge Harlen's footnote attached to his dissent provides a very interesting insight into the thinking of the U.S. Supreme Court:

> "There is no suggesting that petitioner was not afforded opportunity

> to examine any witnesses he wanted either before or after respondents made their motion for summary judgment."

Therefore, we can see from the above that it is erroneous enough to deny a party the right to have a trial of the issues where there is a material issue of fact developed by conflicting affidavits, but it is absolutely unconscionable for the United States Court of Claims to deny discovery by a claimant and subsequently grant summary judgment on behalf of the United States Government when there has been no opportunity afforded the claimants to depose adverse witnesses and to examine documents in the possession of the government, which documents would determine the presence or absence of liability in the case.

CONCLUSION.

FOR THE REASONS SET FORTH ABOVE, IT IS RESPECTFULLY SUBMITTED THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Yours, etc.,

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Appendix

A1

ORDER.

IN THE UNITED STATES COURT OF CLAIMS

No. 557-80C

FRANGELLA MUSHROOM FARMS, INC.)
and JOSEPH C. FRANGELLA)
)
v.)
)
THE UNITED STATES)

Contracts; oral; implied in fact; standing to sue; collateral estoppel; affidavits.

E. David Duncan, attorney of record, for plaintiffs. Lyons and Duncan, of counsel.

Sara V. Greenberg, with whom was Acting Assistant Attorney General Stuart E. Schiffer, for defendant.

Before FRIEDMAN, Chief Judge, KUNZIG and BENNETT, Judges.

O R D E R

This breach of contract case is presented to the court on defendant's motion for summary judgment and plaintiffs' response in objection thereto. We allow the motion and dismiss the petition.

Plaintiff Frangella Mushroom Farms, Inc. (corporate plaintiff) is engaged in the business of growing mushrooms. The individual plaintiff, Joseph C. Frangella, is president and majority stockholder. Plaintiffs assert breach of contract arising out of promises of financial assistance allegedly made by the Economic Development Administration (EDA), of the Department of Commerce, to the corporate plaintiff. The individual plaintiff sues for personal damages said also to have been sustained from the alleged breaches.

Beginning in 1976, the corporate plaintiff made unsuccessful attempts to obtain federal financial assistance under 19 U.S.C. § 2341 (Trade Act of 1974). Litigation ensued in the United States District Court for the Northern District of New York which, on February 20, 1979, remanded the matter to EDA with instructions to determine eligibility of plaintiff for certification for adjustment assistance. After extensive investigation and review EDA decided that plaintiff did not qualify under the statutory requirements for certification. This decision was unsuccessfully appealed and is not now in issue.

Corporate plaintiff thereafter sought assistance of a Member of Congress and made application for a direct business development loan under 42 U.S.C.

§ 3142 (1976), in the amount of $1,500,000, later reduced to $1,000,000. Because EDA's direct loan funds were exhausted in April 1980, it determined that the most it could do would be to guarantee a bank loan if it was found to be a sound loan. Accordingly, a series of meetings ensued between Mr. Frangella and representatives of the Key Bank of Albany, New York, and representatives of EDA. These meetings are referred to in greater detail below. Because the bank and EDA became aware of certain adverse financial information about the corporate plaintiff, it was requested to furnish information to demonstrate its repayment ability.[1/] This

1/ There was already substantial state and federal government participation in this company. Farmers Home Administration had guaranteed 90 percent of a $400,000 loan made in October 1979. The Small Business Administration guaranteed approximately 43 percent of a $600,000 loan made (continued)

effort did not result in dispelling the issue and the application was denied finally on August 1, 1980. This suit followed on October 16, 1980.

The central issue presented to the court is whether there was in fact any authorized promise or promises by government agents to plaintiffs of financial assistance by EDA, as alleged. If such promises were made, we must determine whether they constitute an express contract or a contract implied in fact. There is a final question as to whether Mr. Frangella, the individual plaintiff, has stated a claim upon which relief can be granted.

Plaintiffs' petition and brief place great emphasis on certain meetings

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(footnote continued)
in November 1973, and the New York State Job Development Authority purchased a $410,000 participation in a loan made by Key Bank in June 1978.

between representatives of plaintiffs and those of EDA on November 5, 1979, and May 15, 1980. It is represented to us that at the first of these meetings, in Philadelphia, Edward J. Morris, Chief of the Business Development Division of the Atlantic Regional Office of EDA, and his assistant, Jack Geraghty, a financial analyst, assured plaintiffs that "the necessary paper work would be forwarded and the direct loan was approved and a closing would take place between December 20, 1979, and January 20, 1980." There were delays, however. Careful review convinced Mr. Morris that corporate plaintiff was "technically insolvent." A meeting of representatives of plaintiffs, EDA, and of the Key Bank took place on April 4, 1980, at which time plaintiffs were advised that no direct loan monies were available, but that EDA

would entertain an application for a guaranteed loan. Plaintiffs claim $20,000,000 in breach damages for failure to make the direct loan allegedly promised. Mr. Frangella claims a like amount.

The meeting of May 15, 1980, was held in Washington, D. C. At this meeting EDA was represented by Robert Dennis, an EDA financial analyst in the Project Reveiw Division, Office of Development Finance Projects. Plaintiffs claim that Mr. Dennis said the guarantee by EDA of 90 percent of the loan "would be forthcoming" and would be sent to Key Bank on or about June 13, 1980. Plaintiffs were required to submit supplementary data. In early August 1980 plaintiffs received a letter from EDA advising that the guarantee for the million dollar loan would

not be forthcoming. Plaintiff corporation claims $20,000,000 in damages for breach of express contract. The damages are claimed to be for loss of credit and for reimbursement of expenses occasioned by defendant's bad faith and delays, and misrepresentations concerning the matter of guaranteeing a bank loan. Mr. Frangella claims a like amount in personal damages.

The stark assertions in the petition claiming that plaintiffs received definite and binding promises from EDA are unsupported by documentation. Without doubt the parties anticipated that, if they reached a meeting of minds, any agreements would be documented. *United States v. American Renaissance Lines, Inc.*, 494 F.2d 1059 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974). The most

that can be said on plaintiffs' behalf is that defendant's representatives agreed to help the corporate plaintiff if plaintiff could demonstrate the necessary financial soundness and potential ability to repay funds directly loaned, or loans guaranteed. Extensive review of plaintiffs' financial situation was made and is in the record before us. It demonstrates that plaintiffs' hopes for financial assistance were dashed by its inability to meet income projections, inability to sell all of its product as represented to EDA, lack of qualified management, inadequate record keeping, and insufficient collateral. Plaintiffs were deeply in debt, even to the extent of using personal life insurance of the Frangella family members as collateral. It is difficult to believe that Mr.

Frangella really believed that he had a binding promise that EDA would guarantee a bank loan for him. Two months after the alleged guarantee agreement he wrote to EDA on July 9, 1980:

> Please be advised that, in regard to the condominium that I own in the State of Florida, I hereby agree that, *in the event* the One Million ($1,000,000) Dollar *anticipated EDA guaranteed loan is approved and carried out*, I will invest the net proceeds, after taxes, from the sale of the condominium into Frangella Mushroom Farms, Inc. (Emphasis added.)

Defendant has furnished the court with the sworn affidavits of Edward J. Morris, Jack Geraghty, and Robert Dennis. They all deny making the promises plaintiffs claim were made and further state that they had no authority to make such promises and so advised plaintiffs on

more than one occasion. These statements as to authority accord with applicable EDA directives, likewise a part of the record. Absent a showing of the necessary authority, and this is plaintiffs' burden which has not been met, there can be no contract. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947); *Thanet Corp. v. United States*, 219 Ct. Cl. ___, 591 F.2d 629 (1979); *Haight v. United States*, 209 Ct. Cl. 698, *cert. denied*, 429 U.S. 841 (1976); *Jascourt v. United States*, 207 Ct. Cl. 955, *cert. denied*, 423 U.S. 1032 (1975).

We can find no express contract, no contract implied in fact, and no authority in the named agents to make such contracts. Had corporate plaintiff been able to establish eligibility for assistance, these agents could have recommended

it to their superiors for final action. They did not do so. They expressed a willingness to consider an application which might eventually lead to a binding loan agreement. This is not enough to establish a contractual relationship. Nor do plaintiffs' disappointment and efforts to comply with defendant's requirements for information establish a contract. *Maimon v. United States*, Ct. Cl. No. 300-78 (order entered March 16, 1979); *Tree Farm Development Corp. v. United States*, 218 Ct. Cl. ___, 585 F.2d 493 (1978).

The claims of the individual plaintiff are that he changed his position to his detriment when he relied on the alleged promises of defendant and expended his personal assets and credit to keep plaintiff corporation afloat while waiting for EDA to deliver on its

promises. Mr. Frangella sought to make a contract for his corporation. Individually, he was not at any time in privity with the defendant in a contractual way. If defendant had any duty here, it was to the corporate plaintiff. The individual plaintiff has not stated a claim on which relief can be granted. He has no standing to sue in this court even though he was corporate plaintiff's "guiding light." *Algonac Mfg. Co. v. United States*, 192 Ct. Cl. 649, 428 F.2d 1241 (1970).

Just as we must reject plaintiffs' claim of a contract implied in fact because of failure to prove a mutual intent to contract, so must we reject plaintiffs' assertions that defendant is bound by collateral estoppel. The latter doctrine requires a showing that the party against whom estoppel is to be set up

acquiesced in the alleged transaction and had authority to do so. Clearly, there was no such acquiescence here. *Emeco Industries, Inc. v. United States*, 202 Ct. Cl. 1006, 1014-15, 485 F.2d 652, 657-58 (1973); *Byrne Organization, Inc. v. United States*, 152 Ct. Cl. 578, 282 F.2d 582 (1961).

Finally, plaintiffs would have us deny summary judgment and remand the case for trial on the disputed issue of whether there was a contract implied in fact. Mr. Frangella's affidavit proclaims that he received binding promises from defendant. There is also before us the affidavit of a certified public accountant, Arthur Place, who aided in the preparation of corporate plaintiff's applications for financial assistance and who attended the aforesaid meetings and

heard defendant's agents make allegedly binding promises, first of a direct loan, and later of a guaranteed loan. Plaintiffs also proffer a guaranty agreement dated June 30, 1980, but it is unsigned by anyone for defendant.

If we could see any realistic possibility that a trial, preceded by discovery, would or even might establish a contract, either express or implied in fact, based on oral statements by defendant's agents, we would order it. Such an order here would waste the resources of the parties and of the court. We have the affidavits of defendant's agents. While what they say as to promises made is contradicted by Mr. Frangella and Mr. Place, plaintiffs have not shown authority in Messrs. Morris, Geraghty, and Dennis to make the allegedly binding promises. Of course, it is not in the

nature of government to permit itself to be committed to the expenditure of a million dollars in the loose fashion described in this case. Part of plaintiffs' complaint here pertains to delay costs arising from defendant's insistence on what plaintiffs regard as too much documentation to support EDA decision-making on plaintiffs' application. Yet, plaintiffs do not allege that there was anything in writing by which defendant can be bound here on its alleged promises so there is nothing useful to discover. And as to testimony, we have it by affidavit. We believe the affidavits furnished by defendant to have the greatest credibility in this case.

IT IS THEREFORE ORDERED, upon consideration of defendant's motion for summary judgment and plaintiffs' response

thereto exhibits furnished by the parties and the authorities cited by them, but without oral argument, plaintiffs' motion therefor being denied, that defendant's motion for summary judgment is granted. The petition is dismissed.

BY THE COURT

Marion T. Bennett
Judge